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July 10, 1998

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, D.C. 20554

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: CC Docket No. 98-84

Dear Ms. Salas:

Enclosed is an original and 13 copies of the Comments of Frontier Telemanagement, Inc. and Advanced Telecommunications, Inc. Please date stamp and return the extra copy with our courier.

In addition, a 3.5 inch floppy diskette formatted in WordPerfect 5.1 containing the Comments is being submitted to Janice Myles of the Common Carrier Bureau.

Very truly yours,

Robert S. Tanner

RST/ck

cc: Janice Myles  
FCC Common Carrier Bureau  
1919 M St., NW, Room 544  
Washington, D.C. 20554

ITS  
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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
McLEODUSA TELECOMMUNICATIONS	)	CC Docket No. 98-84
SERVICES, INC.	)	
	)	
Petition for Preemption of Nebraska Public	)	
Service Commission Decision Permitting	)	
Withdrawal of Centrex Plus Service by	)	
U S WEST Communications, Inc.	)	
_____	)	

**COMMENTS OF FRONTIER TELEMAGEMENT, INC.  
AND ADVANCED TELECOMMUNICATIONS, INC.**

Frontier TeleManagement, Inc. ("FTI") and Advanced Telecommunications, Inc. ("ATI") (collectively, the "Joint Filers"), by their attorneys, hereby file their comments in support of the above-captioned "Petition for Preemption, Declaratory Ruling, and Injunctive Relief" (the "Petition") filed by McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"). The Joint Filers, like McLeodUSA, are Centrex resellers operating in U S WEST Communications, Inc. ("U S WEST") territory.<sup>1</sup>

In its Petition, McLeodUSA requests the Commission to preempt a decision of the Nebraska Public Service Commission<sup>2</sup> (the "NPSC") allowing U S WEST to withdraw its

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<sup>1</sup> FTI, a subsidiary of Frontier Corp, resells Centrex service to customers over more than 100,000 lines in thirty states. FTI serves customers in four states in U S WEST territory (Colorado, Minnesota, Oregon and Washington) and has obtained or is in the process of obtaining authority to provide service in two others (Arizona, Nebraska). ATI, a relative newcomer to the market, began serving customers in Minnesota in 1996. It currently has 200 employees, revenues of \$25 million per year and is looking to expand. ATI currently serves customers in four states in U S WEST territory (Colorado, Minnesota, Oregon and Washington) and in Nevada.

<sup>2</sup> McLeod Telemanagement, Inc., Docket Nos. FC-1252, 1253, and 1254 (Neb. Pub. Serv. Comm., Nov. 25, 1996).

Centrex service as a violation of Section 253(a) of the Communications Act of 1934, as amended, (the “Communications Act”).<sup>3</sup> McLeodUSA explains that Centrex resale is its preferred platform for the provision of local exchange service.<sup>4</sup> The NPSC’s decision permitting U S WEST to withdraw its Centrex service has frustrated McLeodUSA’s efforts to enter the Nebraska market and therefore constitutes an effective prohibition on McLeodUSA’s ability to provide an interstate or intrastate telecommunications service contrary to Section 253(a).<sup>5</sup> In contrast to the actions of the NPSC, eleven other states within U S WEST’s territory refused to allow U S WEST to withdraw its Centrex service. The Commissions in those states recognized that U S WEST’s efforts to grandfather Centrex service was anti-competitive, unreasonable and discriminatory in violation of state and federal law.<sup>6</sup>

The NPSC’s decision to allow U S WEST to withdraw Centrex has substantially undermined the Joint Filers’ ability to provide competitive telecommunications services in Nebraska by withdrawing the platform each Joint Filer could use to provide service to its customers. The Commission must preempt the NPSC’s decision in order to further the goals set forth in the Telecommunications Act of 1996 (the “1996 Act”)<sup>7</sup> of promoting the development of telecommunications competition and preventing local and state regulation, or incumbent carriers, from frustrating the development of that competition.

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<sup>3</sup> 47 U.S.C. § 253(a).

<sup>4</sup> See Petition at 2.

<sup>5</sup> See Id. at 3.

<sup>6</sup> Id. at 21-23. U S WEST proposed in each state to withdraw Centrex service for new customers and to grandfather the service for existing customers. Consequently, existing Centrex resellers would be able to continue to resell Centrex service to existing customers, but they would not be able to capture new customers. Moreover, potential competitors would be completely barred from entering the market.

<sup>7</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et. seq.

The Commission is well aware of the potentially deleterious impact that U S WEST's withdrawal of Centrex service could have on telecommunications competition and the violations such withdrawal would create under the Communications Act. Over two years ago, FTI, then known as Enhanced Telemanagement Inc. ("ETI"), filed a formal complaint asking the Commission to find U S WEST in violation of the Communications Act based on U S WEST's attempt to withdraw its Centrex service in Nebraska and the thirteen other states in U S WEST's territory.<sup>8</sup> ETI relied on the 1996 Act, the Commission's long-standing recognition of the pro-consumer and pro-competitive benefits of resale, and the Commission's policy favoring unlimited resale of telecommunications services to demonstrate that U S WEST's attempt to "grandfather" its Centrex offerings constituted: (1) an unreasonable or discriminatory condition or limitation on the resale of Centrex service in violation of 47 U.S.C. §§ 251(b)(1) and 251(c)(4); and unjust and unreasonable discrimination against ETI and other Centrex resellers in violation of 47 U.S.C. § 202(a).<sup>9</sup> Since ETI filed its complaint, U S WEST's withdrawal of its Centrex service in Nebraska has indeed stifled competition and market entry by those competitors choosing a resale strategy.

In addition to violating the Communications Act for the reasons alleged in ETI's complaint, the NPSC's decision allowing U S WEST to grandfather its Centrex service also violates Section 253(a) of the Communications Act by effectively prohibiting the ability of the Joint Filers to provide telecommunications service. Congress enacted Section 253 to ensure that the actions of state and local governments do not frustrate the federal government's interest in

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<sup>8</sup> See Enhanced TeleManagement, Inc. v. U.S. West Communications, Inc., File No. 96-23, filed February 22, 1996 ("ETI Complaint").

<sup>9</sup> See ETI Complaint at 3, 7-8. A copy of the ETI Complaint is provided as Attachment A hereto.

promoting competition in the provision of telecommunications services.<sup>10</sup> The NPSC, in granting U S WEST's request to withdraw its Centrex service, ignored the substantive requirements of the 1996 Act and the impact that its decision inevitably would have on the 1996 Act's goals to establish a "pro-competitive, deregulatory national policy framework."<sup>11</sup> The Commission has emphasized that the nationwide implications of state and local telecommunications regulation is closely linked to the 1996 Act's statutory direction to preempt barriers to entry:

Each local government may believe it is simply protecting the interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. We believe that Congress' recognition of this fact was the genesis of its grant of preemption authority to this Commission.<sup>12</sup>

The Commission has acknowledged its role in carrying out Congress' direction to preempt state and local government actions that effectively prohibit communications competition. The Commission has said:

in evaluating whether a state or local provision has the impermissible effect of prohibiting an entity's ability to provide any telecommunications service, [the Commission will] consider whether it 'materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'<sup>13</sup>

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<sup>10</sup> See Public Utility Commission of Texas, 13 FCC Rcd 3460, 3480 (1997) ("Texas PUC")

<sup>11</sup> Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104<sup>th</sup> Cong., 2d Sess. 113 (1996) at 1 (emphasis added).

<sup>12</sup> TCI Cablevision of Oakland County, Inc., 12 FCC Rcd 21396, 21442 (1997) ("TCI").

<sup>13</sup> Id. at 21439, quoting California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, 12 FCC Rcd 14191, 14206 (1997).

Accordingly, the Commission has found Section 253 “expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that “prohibit[s] or has the effect of prohibiting” a firm from providing any interstate or intrastate telecommunications service.”<sup>14</sup> The Commission has also said it is commanded by this provision “to sweep away . . . those state or local requirements that have the practical effect of prohibiting an entity from providing service.”<sup>15</sup> As McLeodUSA explained in its Petition, the NPSC’s decision has had just such an effect on Centrex resellers who, as a direct result of the NPSC’s decision, are no longer able to compete with U S WEST in the provision of telecommunications services.

Furthermore, for purposes of the Commission’s Section 253 analysis, it is irrelevant that the NPSC did not foreclose McLeodUSA from conducting its business through other methods of telecommunications resale. In the Texas PUC decision, the Commission stated that:

section 253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service, i.e., new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options. . . . A state may not, therefore, require that an entity provide telecommunications services via its own facilities and limit the entity’s ability to resell incumbent LEC services or restrict the use of unbundled network elements provided by the incumbent.”<sup>16</sup>

Similarly, the Commission preempted a decision of the Connecticut Department of Public Utility Control (“CDPUC”) allowing only incumbent telephone companies and other certified local exchange carriers to provide pay telephone service in that State because the CDPUC’s decision violated Section 253(a) by prohibiting a certain class of telecommunications providers –

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<sup>14</sup> Texas PUC, 13 FCC Rcd at 3470.

<sup>15</sup> Id.

<sup>16</sup> Id. at 3496 (emphasis added).

payphone providers not affiliated with local telephone companies – from providing a telecommunications service in the State.<sup>17</sup> The NPSC’s decision approving U S WEST’s withdrawal of Centrex violates Section 253(a) for these same reasons: it restricts one means through which telecommunications providers may offer service and has the effect of prohibiting an entire class of telecommunications providers – Centrex resellers – from providing telecommunications services.

Finally, any argument U S WEST may proffer suggesting that the NPSC’s decision does not violate Section 253(a) because U S WEST is providing or may soon provide a modified Centrex service as a replacement for the withdrawn service must fail for at least one of two reasons. First, an argument that a replacement service will soon exist constitutes an admission that no replacement service currently exists. In the absence of a currently available replacement service, competition is stifled. Second, if U S WEST alleges that a replacement service currently exists, the Commission must carefully examine the nature of the alleged replacement service. The new Centrex service that U S WEST has offered to date in several states – called “Centrex Prime” – contains restrictions on common block aggregation that would prevent the type of telecommunications resale that the Joint Filers currently provide.<sup>18</sup> Any reliance by U S WEST on Centrex Prime or some other replacement service must be rejected because the availability of that restricted service in lieu of the grandfathered service frustrates the pro-competitive goals of the 1996 Act and constitutes a Section 253(a) violation by preventing a form a telecommunications resale.

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<sup>17</sup> New England Public Communications Council, 11 FCC Rcd 19713, 19721 (1996). See also TCI, 12 FCC Rcd at 21439.

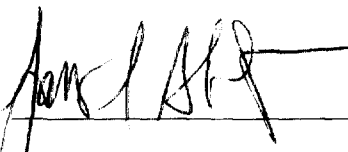
<sup>18</sup> That restriction, limiting a common block only to contiguous property locations, is similar to the restriction the Commission preempted in Texas PUC, 13 FCC Rcd at 3561.

For the reasons stated herein and expressed by McLeodUSA, the Commission should GRANT the relief requested in the "Petition for Preemption, Declaratory Ruling, and Injunctive Relief" and DECLARE that those parts of the Nebraska Public Service Commission's November 25, 1996 Order allowing U S WEST to withdraw its Centrex Plus service are preempted by Section 253 of the Telecommunications Act of 1996.

Respectfully submitted,

FRONTIER TELEMAGEMENT, INC.  
ADVANCED TELECOMMUNICATIONS, INC.

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July 10, 1998

## CERTIFICATE OF SERVICE

I, Robert S. Tanner, an attorney in the law offices of Davis Wright Tremaine LLP, hereby certify that on this 10<sup>th</sup> day of July 1998, a copy of the foregoing "Comments of Frontier Telemanagement, Inc. and Advanced Telecommunications, Inc." was served by first class mail, postage prepaid, to:


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